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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

LAURA BIANCA SAKO, Plaintiff and Respondent, v. LUSH COSMETICS, INC., et al., Defendants and Appellants.	E069392 (Super.Ct.No. CIVDS1710297) OPINION

APPEAL from the Superior Court of San Bernardino County. David S. Cohn, Judge. Reversed with directions.

Simpson, Garrity, Innes & Jacuzzi, Paul V. Simpson and Kendall M. Burton for Defendants and Appellants.

The Myers Law Group, David P. Myers and Jason Hatcher for Plaintiff and Respondent.

Laura Bianca Sako sued her former employer, Lush Cosmetics, Inc. (Lush), and her former manager, Kryshna Chapel Weathersby, for employment law violations. Sako signed an arbitration agreement when she began her employment with Lush. Defendants

petitioned to compel arbitration of Sako's complaint on that basis. The trial court found that there was no agreement to arbitrate and denied the petition.

Defendants appeal, arguing that Lush and Sako entered into a binding arbitration agreement. They also challenge Sako's other defenses to arbitration, which the trial court never reached. We conclude that the court erred in finding no agreement to arbitrate, and we reject Sako's other defenses, except one that relates to Weathersby. Weathersby is not a party to the arbitration agreement and has no right to compel arbitration of the claims against her. The trial court has discretion to decide how to proceed with the arbitrable claims against Lush and the nonarbitrable claims against Weathersby. We therefore reverse the order and direct the court to exercise its discretion on remand.

BACKGROUND

A. *Factual Background*

In March 2015, Lush hired Sako to be a sales ambassador at one of its stores. Lush requires all employees to sign an arbitration agreement as a condition of their employment. Sako signed a four-page document printed on Lush letterhead and entitled, "FORM 8–Mediation and Arbitration Agreement." (Boldface omitted) An opening paragraph of the agreement states: "[C]ertain disputes that may arise from your employment with [Lush] or the termination of your employment must (after appropriate attempts to resolve your dispute internally through [Lush] management channels are not successful) be submitted for resolution by non-binding mediation and, if necessary, binding arbitration."

Elsewhere the agreement reads: "As a condition of your employment at [Lush], you agree that any controversy or claim arising out of or relating to your employment relationship with [Lush] or the termination of that relationship, must be submitted for non-binding mediation before a third-party neutral and (if necessary) for final and binding resolution by a private and impartial arbitrator." The arbitration agreement expressly excludes six categories of claims, including claims by either party for injunctive or other equitable relief.

Sako acknowledged that her agreement was "given in exchange for rights to which" she was "not otherwise entitled," namely, her employment with Lush. Lush "likewise agree[d] to the use of mediation and arbitration as the exclusive forum for resolving employment disputes covered by this [a]greement." The parties agreed: "[A]ny Claim between or among any of the parties to this Agreement will be resolved under the Federal Arbitration Act, 9 U.S.C. section 1 *et seq.*"

The agreement states that both parties are "encouraged to make good faith efforts at resolving any dispute internally on an informal basis through" management channels. If informal resolution efforts fail, disputes "must first be submitted for non-binding mediation before a neutral third party." If the dispute remains unresolved after mediation, either party "may submit the dispute for resolution by final binding confidential arbitration." The agreement specifies that both procedures will be governed by the American Arbitration Association's (AAA) rules for employment arbitrations and mediations "or other applicable rules," and it also provides the web address where the AAA's rules may be found.

Each party is to give written notice of any claim to the other party as soon as possible after the aggrieved party knows "or should have known of the facts giving rise to the claim." If the aggrieved party does not make a written request for mediation or arbitration within the applicable statute of limitations, the aggrieved party waives the right to raise the claim in any forum. The parties agreed to share equally the arbitrator's and mediator's fees and the AAA administrative fees, "except in jurisdictions where the employer is legally required to pay these costs."

The last paragraph of the arbitration agreement states:

"By providing your signature below, you indicate your agreement to the terms set forth above. By the provision of the signature of the [Lush] official named below, [Lush] indicates its agreement, as well, to the terms set forth in this Procedure. Both parties understand that by agreeing to the terms in this Procedure, both are giving up any constitutional or statutory right they may possess to have covered claims decided in a court of law before a judge or a jury.

"Agreed to and acknowledged:

"On behalf of [Lush]

"Stephen Dynes, Officer, HR Policy and Compliance Dated: June 27, 2013"

The area for Sako's signature follows. Her name is typewritten, and a handwritten signature appears next to it. The typewritten date next to her signature is March 2, 2015.

In June 2015, Lush started a specialty product campaign selling soap that said, "Gay is ok." Sako is a heterosexual female and a member of the Baptist religion. Weathersby was the store manager and supervised Sako. Sako told Weathersby that she

did not feel comfortable marketing the soap because of her religious beliefs. After this private conversation, coworkers allegedly harassed Sako on the basis of her religious beliefs and heterosexuality. The harassment continued from June 2015 to October 2015. Sako complained about the harassment to Weathersby and eventually to Lush's human resources. Sako also was allegedly pressured to miss rest periods and take late lunch breaks, and Lush did not reimburse her for certain business expenses. In November 2015, Weathersby terminated her.[1]

B. *Trial Court Proceedings*

After obtaining a right-to-sue letter from the Department of Fair Employment and Housing, Sako filed the instant complaint in June 2017. Seven causes of action allege violations of the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.) based on religious or sexual orientation discrimination (Gov. Code, § 12940, subd. (a)), religious or sexual orientation harassment (Gov. Code, § 12940, subd. (j)), failure to prevent harassment and discrimination (Gov. Code, § 12940, subd. (k)), and retaliation (Gov. Code, § 12940, subd. (h)). Four causes of action allege violations of the Labor Code for whistleblower retaliation (Lab. Code, § 1102.5), failure to provide rest periods (Lab. Code, § 226.7), failure to reimburse business expenses (Lab. Code, § 2802), and failure to pay all wages due at separation (Lab. Code, § 201). One cause of action alleges wrongful termination in violation of public policy. The final cause of action for

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[1] We draw this summary of events from June 2015 to November 2015 from the allegations of Sako's complaint.

declaratory relief seeks a declaration that defendants violated Sako's rights when they unlawfully terminated her.

In July 2017, Lush offered to pay the costs of mediation, provided that Sako stay the court case and proceed to arbitration if mediation was unsuccessful. Sako agreed to mediation, but she would not commit to arbitration in the event of an unsuccessful mediation. Lush responded that it would file a motion to compel arbitration if she did not agree to the procedure as proposed. Sako said that she would oppose a motion to compel arbitration. Lush replied that it would file the motion, and explained: "Just to be crystal clear, Lush is not insisting that Sako participate in a mediation. As previously advised, it is willing to pay 100% of the costs of mediation if Sako wishes to participate. It is not moving to compel mediation. Lush is moving to compel arbitration. Please let me know if Plaintiff will arbitrate in accordance with her Agreement."

One week after this correspondence, defendants filed a petition to compel arbitration and dismiss or stay the action. They argued that the arbitration agreement was enforceable and covered all of Sako's causes of action. Sako argued in opposition that no agreement to arbitrate was formed because Lush never signed the arbitration agreement. Dynes's name was printed on the form, but no handwritten signature accompanied it. Sako contended that the signature of *both* parties was a condition precedent to the formation of the agreement. In the alternative, she argued that the arbitration agreement was unconscionable; that Lush had not requested performance consistent with the terms of the agreement, and it could not therefore compel specific performance; that Weathersby could not compel arbitration as a nonsignatory to the agreement, and because

the causes of action against Weathersby had to remain in court, the court should exercise its discretion to deny the petition altogether; and that the court should stay the action in the event that it decided the dispute was arbitrable.

The trial court denied the petition to compel arbitration. It focused on the paragraph above the signature lines, and in particular the statement, "By the provision of the signature of the [Lush] official named below, [Lush] indicates its agreement, as well, to the terms set forth in this Procedure." The court concluded that Lush had to name an individual and have that person sign the agreement. But because Dynes had not signed the agreement, Lush did not manifest its consent, and consequently there was no "meeting of the minds." The court therefore found no agreement to arbitrate. In light of this ruling, the court found no need to rule on Sako's other arguments.

Defendants timely appealed from the order denying their petition to compel arbitration.[2]

DISCUSSION

We begin with the argument that persuaded the trial court and then address Sako's other contract defenses. The facts on which she relies for all of her defenses are undisputed, so they present issues of law that we may resolve without remand. (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 884.) We conclude that she and Lush have a valid and enforceable arbitration agreement, but it does not cover claims against Weathersby or claims for declaratory relief.

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[2] An order denying a petition to compel arbitration is appealable. (Code Civ. Proc., § 1294, subd. (a).)

I. *The Formation of the Arbitration Agreement*

Defendants contend that the court erred by finding no agreement to arbitrate. We agree. The evidence of the parties' mutual assent to the agreement was clear, and Lush was not required to have one of its agents sign the agreement by hand to show consent.

The arbitration agreement states that any claim between the parties will be resolved under the Federal Arbitration Act (FAA). Section 2 of the FAA provides that written arbitration agreements are "valid, irrevocable, and enforceable" (9 U.S.C. § 2), but "they may be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability'" (*Rent-A-Center, W., Inc. v. Jackson* (2010) 561 U.S. 63, 68). The effect of Section 2 "is to create a body of federal substantive law of arbitrability" and to declare "a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." (*Moses H. Cone Memorial Hosp. v. Mercury Const.* (1983) 460 U.S. 1, 24.) "Nonetheless, it is a cardinal principle that arbitration under the FAA 'is a matter of consent, not coercion,'" and courts cannot compel parties to arbitrate where they have not consented. (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236 (*Pinnacle*), quoting *Volt Info. Sciences v. Bd. Of Trustees* (1989) 489 U.S. 468, 479.)

We apply general principles of state contract law to determine whether parties have entered into a binding arbitration agreement, "while giving due regard to the federal policy favoring arbitration." (*Pinnacle, supra,* 55 Cal.4th at p. 236.) The party seeking to compel arbitration bears the burden of proving an agreement to arbitrate exists. (*Ibid*.) Where, as here, the evidence is not in dispute, we decide de novo whether a contract to

arbitrate exists. (*Ibid.*; *Serafin v. Balco Properties Ltd., LLC* (2015) 235 Cal.App.4th 165, 173 (*Serafin*).)

"An essential element of any contract is the consent of the parties, or mutual assent. (Civ. Code, §[§] 1550, subd. 2, 1565, subd. 2.) Mutual assent usually is manifested by an offer communicated to the offeree and an acceptance communicated to the offeror." (*Donovan v. RrL Corp.* (2001) 26 Cal.4th 261, 270-271; accord Rest.2d Contracts, § 22.) Courts determine mutual assent under an objective standard and look to the parties' outward manifestations or expressions. (*Serafin, supra*, 235 Cal.App.4th at p. 173.) "The test is whether a reasonable person would, from the conduct of the parties, conclude that there was a mutual agreement." (*Marin Storage & Trucking, Inc. v. Benco Contracting & Engineering, Inc.* (2001) 89 Cal.App.4th 1042, 1050.) When it comes to accepting an offer, language in a contract "'referring to a particular mode of acceptance is often intended and understood as suggestion rather than limitation; the suggested mode is then authorized, but other modes are not precluded.'" (*Pacific Corporate Group Holdings, LLC v. Keck* (2014) 232 Cal.App.4th 294, 312.)

The principles of contract formation apply straightforwardly here. When Lush gave Sako the arbitration agreement, it constituted an offer to mediate and arbitrate disputes between the parties, and Sako expressly accepted that offer by signing the agreement. The consideration for Sako's promise was her employment with Lush. Lush employed her for approximately eight months after she consented to the agreement. Any reasonable person viewing this offer, acceptance, and exchange of consideration would conclude that Lush had consented to its own proposed agreement. (Any reasonable

person would likewise conclude that Sako had consented to the arbitration agreement, but she does not dispute that she consented to it.)

Dynes's failure to sign the agreement by hand does not defeat Lush's consent to the agreement. Sako contends that a signature was the *only* manner in which Lush could evidence its consent, according to the terms of the agreement. Like the trial court, Sako focuses on the signature provision. ("By the provision of the signature of the [Lush] Official named below, [Lush] indicates its agreement, as well, to the terms set forth in this Procedure.") Nothing in this language fixes a signature as the *exclusive* means for Lush to indicate its consent to the agreement. Rather, the sentence prescribes one means by which Lush could show its consent. Although Lush was not accepting an offer—it was instead the offeror—the rules governing modes of acceptance should apply with equal force here. That is, we should distinguish between language that imposes an absolute condition on the manner of the offeror's consent, and language that merely suggests a permitted manner of consent. (See *Pacific Corporate Group Holdings, LLC v. Keck*, *supra*, 232 Cal.App.4th 294 at pp. 311-312.) This makes all the more sense where we are considering the conduct of an offeror, whose consent to its own proposed terms is implied by the offer. If the signature provision is to displace the reasonable meaning of Lush's actions, the provision should state in certain terms that the only possible way to indicate consent is a signature. It does not.

The case on which Sako primarily relies does not persuade us that the parties failed to form an arbitration agreement. In *Banner Entertainment, Inc. v. Superior Court* (*Alchemy Filmworks, Inc.*) (1998) 62 Cal.App.4th 348 (*Banner*), the plaintiff (Banner)

did not sign two draft contracts containing an arbitration clause and opposed a motion to compel arbitration filed by the defendant and drafter of the contracts (Alchemy). (*Id.* at pp. 352-353.) The contracts were not simply arbitration agreements. (*Ibid.*) The parties had a short-term oral agreement to market films and were trying to negotiate a longer-term written contract. (*Id.* at pp. 352, 359.) Banner proposed changes to the draft contracts, but the negotiations fell apart. (*Id.* at pp. 353, 359-360.) Banner told Alchemy that it was no longer interested in a business relationship because it was dissatisfied with Alchemy's work during the short-term deal. (*Id.* at p. 361.)

In this context, the *Banner* court concluded "that there was no evidence at all which would support a finding of an agreement to arbitrate." (*Banner*, *supra*, 62 Cal.App.4th at p. 357.) The back and forth negotiations had never resulted in an agreement on all terms contained in the drafts. (*Id.* at pp. 360-361.) In addition, the draft contracts stated: "[T]his agreement *when signed by the parties hereto* will constitute a legal and binding obligation of the parties. [¶] Please acknowledge your approval of the foregoing terms by signing a copy of this letter in the space indicated below." (*Id.* at p. 354.) The court found it significant that Banner had not signed the draft contracts and observed: "When it is clear, both from a provision that the proposed written contract would become operative *only* when signed by the parties as well as from any other evidence presented by the parties that both parties contemplated that acceptance of the contract's terms would be signified by signing it, the failure to sign the agreement means no binding contract was created." (*Id.* at p. 358.) There was no evidence that the parties

had agreed Banner could assent in some manner other than signing the drafts and returning them to Alchemy. (*Id.* at p. 360.)

The upshot of *Banner* is that no reasonable person seeing the parties' conduct would conclude that Banner had assented to an agreement. Given the "other evidence" that Alchemy had proposed terms, and that Banner had essentially counteroffered by proposing changes, both parties had to manifest their acceptance by signing drafts that incorporated both parties' terms. That is plainly not the case here, where we have a straightforward offer and acceptance.

Even the *Banner* court acknowledged that the lack of a signature alone was not determinative. The court discussed federal case law cited by Alchemy in which the courts enforced arbitration clauses in unsigned agreements. (*Banner*, *supra*, 62 Cal.App.4th at p. 361.) It found these cases distinguishable because evidence of past dealings showed an agreement to arbitrate, or the parties had ratified the unsigned agreements by repeatedly acknowledging their validity. (*Ibid*.) "In other words, in the cases cited by Alchemy, *there was evidence of an agreement to arbitrate*, regardless of whether the agreement was signed. . . . [I]t is not the presence or absence of a *signature* which is dispositive; it is the presence or absence of evidence of an *agreement* to arbitrate which matters." (*Ibid*.)

We have no doubt that there was an agreement to arbitrate here, regardless of whether a Lush agent signed it by hand. The trial court erred in holding otherwise.

II. *Counteroffer and Abandonment Arguments*

We turn now to Sako's other contract defenses, starting with her counteroffer and abandonment arguments. Sako contends that she repudiated the arbitration agreement by filing this lawsuit, and Lush's response amounted to either a counteroffer, which she did not accept, or an abandonment of the agreement. We disagree.

As a preliminary matter, we note that Sako's argument in the trial court was slightly different. She did not argue that Lush had counteroffered with a new proposal or had abandoned the agreement. Instead, she relied on the statute authorizing petitions to compel arbitration, Code of Civil Procedure section 1281.2, which requires the petitioner "to plead and prove a prior demand for arbitration under the parties' arbitration agreement and a refusal to arbitrate under the agreement."[3] (*Mansouri v. Superior Court* (2010) 181 Cal.App.4th 633, 640.) The petitioner's prefiling demand to arbitrate must be consistent with the terms of the agreement. (*Id.* at pp. 637, 640-642 [petition must be denied where petitioner demanded arbitration before a single arbitrator, but the arbitration agreement required a three-arbitrator panel].) "Such demand and refusal is what requires and justifies the intervention of the court to order arbitration under the agreement." (*Id.* at p. 641.) Lush's prefiling demand was to mediate and then arbitrate, if the mediation was unsuccessful. In several places, the agreement states that disputes between the

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3 Code of Civil Procedure section 1281.2 states in relevant part: "On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party to the agreement refuses to arbitrate that controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists."

parties *must* be submitted to nonbinding mediation *and,* if necessary, binding arbitration. Lush's prefiling demand thus mirrored the terms of the agreement precisely and justified the intervention of the court.

Sako's reliance on slightly different arguments on appeal could be construed as a forfeiture of the new arguments. (*Mansouri v. Superior Court, supra,* 181 Cal.App.4th at pp. 639-640.) However, we may allow a party "'to assert a new theory of the case on appeal where the facts were clearly put at issue at trial and are undisputed on appeal.'" (*Id.* at p. 639.) Sako bases her counteroffer and abandonment arguments on Lush's prepetition correspondence with her. The parties put this same correspondence at issue in the trial court, and they do not dispute the relevant facts now. We therefore consider Sako's counteroffer and abandonment arguments.

A party to a contract may expressly or implicitly repudiate it. (*Taylor v. Johnston* (1975) 15 Cal.3d 130, 137.) "An express repudiation is a clear, positive, unequivocal refusal to perform." (*Ibid.*) An abandonment of a contract may be implied where one party repudiates a contract, and the other party acquiesces in the repudiation. (*Dessert Seed Co. v. Garbus* (1944) 66 Cal.App.2d 838, 847.) Once the parties have abandoned the contract, each party is released from performance. (*Honda v. Reed* (1958) 156 Cal.App.2d 536, 540.)

Even if Sako repudiated the agreement by filing this lawsuit, Lush did not respond by counteroffering. Sako sees a rejected counteroffer in Lush's prefiling demand that the parties arbitrate. She characterizes that as a "new proposal of making arbitration mandatory" because, in one section, the agreement states that "either party *may* submit

the dispute" to arbitration, if mediation fails. (Italics added.) She reads that section in isolation as rendering arbitration permissive, rather than mandatory. But when read as a whole, the agreement makes arbitration mandatory, provided that mediation is unsuccessful and at least one party chooses to submit the dispute for arbitration. (*Zalkind v. Ceradyne, Inc.* (2011) 194 Cal.App.4th 1010, 1027 [a contract should be read as a whole to derive its meaning].) Lush's prefiling demand signaled to Sako that Lush intended to invoke the existing right to arbitration after any unsuccessful mediation. The demand was not a new proposal.

Sako also argues that Lush acquiesced in her repudiation and thereby abandoned the agreement by petitioning to compel arbitration and not mediation. Lush's petition cannot reasonably be interpreted as a repudiation or abandonment of the agreement when it offered to perform according to the agreement and based its petition on the existence of the agreement. At most, the petition was premature until the parties had engaged in mediation. But by refusing to mediate when Lush requested mediation, Sako waived the mediation condition of the agreement. (*Masonite Corp. v. County of Mendocino Air Quality Management Dist.* (1996) 42 Cal.App.4th 436, 455 [waiver results when a party voluntarily relinquishes a known right or fails to perform a required act].) By petitioning to compel arbitration, Lush also waived the mediation condition, but this was no waiver of arbitration.

In short, none of Lush's conduct amounted to a proposal for a new agreement or an abandonment of the arbitration agreement.

III. *Unconscionability*

Sako also contended that the court should decline to enforce the arbitration agreement because it is unconscionable. This defense is meritless.

"Unconscionability consists of both procedural and substantive elements. The procedural element addresses the circumstances of contract negotiation and formation, focusing on oppression or surprise due to unequal bargaining power. [Citations.] Substantive unconscionability pertains to the fairness of an agreement's actual terms and to assessments of whether they are overly harsh or one-sided." (*Pinnacle*, *supra*, 55 Cal.4th at p. 246.) The party resisting arbitration must show that the agreement is both procedurally and substantively unconscionable (*id.* at p. 247), but each element "need not be present in the same degree" (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 114). They are evaluated on "'a sliding scale.'" (*Ibid.*) The more substantively unconscionable a contract, the less procedurally unconscionable it need be to withhold enforcement, and vice versa. (*Ibid.*)

A. *Procedural Unconscionability*

Sako argues that the agreement was procedurally unconscionable because it failed to include a copy of the AAA rules and failed to define what "other applicable rules" might govern. "The failure to attach a copy of [AAA] rules *could* be a factor supporting a finding of procedural unconscionability where the failure would result in surprise to the party opposing arbitration." (*Lane v. Francis Capital Management LLC* (2014) 224 Cal.App.4th 676, 690, italics added.) But there can "be no surprise" where the rules referenced in the agreement are "easily accessible to the parties." (*Id.* at p. 691.) That is

the case here. Lush specified the particular AAA rules that applied (the employment rules) and provided the web address to locate them. (*Id*. at p. 691 [AAA rules on the Internet were easily accessible]; see also *Peng v. First Republic Bank* (2013) 219 Cal.App.4th 1462, 1472 [holding that "the failure to attach the AAA rules, standing alone, is insufficient grounds to support a finding of procedural unconscionability"].) Moreover, the record shows that Sako received her new hire paperwork from Lush via email, so she did "not appear to lack the means or capacity to locate and retrieve a copy" of the online rules. (*Lane, supra*, at pp. 691-692.)

There could be some surprise to the extent that the AAA rules may be modified or replaced with "other applicable rules." The agreement does not state, however, that Lush may unilaterally impose these other rules. By implication, Sako would have an opportunity to participate in choosing these other rules. Any surprise to Sako would thus be mitigated. The incorporation of "other applicable rules" results in only a minimal degree of procedural unconscionability, if any at all.

B. *Substantive Unconscionability*

Sako argues that the arbitration agreement was substantively unconscionable because it applies only to her claims against Lush and not Lush's claims against her; it gives Lush a "free peek" at her case by requiring her to submit to internal dispute resolution first; it shortens the statute of limitations; it requires "additional steps" that are not statutorily required to pursue claims; and it forces her to incur the expense of mediation as a condition precedent to arbitration. None of these claims shows that the agreement is substantively unconscionable.

Substantive unconscionability refers to "terms that have been variously described as '"'overly harsh'"' [citation], '"unduly oppressive"' [citation], '"so one-sided as to 'shock the conscience'"' [citation], or 'unfairly one-sided' [citation]. All of these formulations point to the central idea that the unconscionability doctrine is concerned not with 'a simple old-fashioned bad bargain' [citation], but with terms that are 'unreasonably favorable to the more powerful party.'" (*Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1145.) "'[T]he paramount consideration in assessing [substantive] conscionability is mutuality.'" (*Nyulassy v. Lockheed Martin Corp.* (2004) 120 Cal.App.4th 1267, 1281.)

The arbitration agreement applies to Sako's claims and Lush's claims alike and therefore does not lack overall mutuality. In arguing otherwise, Sako selectively highlights the language pertaining to her claims. For instance, the agreement states that it covers "claims for which the employee has an alleged cause of action," and "[a]ll those claims whether made against [Lush], any of its subsidiary or affiliated entities or its individual officers or directors." In the same sentence, however, the agreement uses broad language to describe covered claims. The agreement to mediate and arbitrate "[i]ncludes, but is not limited to, any claim that could be asserted in court or before an administrative agency." Courts have found expansive language like this to be "fully mutual in scope." (*Serafin*, *supra*, 235 Cal.App.4th at p. 182.) The covered-claims section also lists examples of typical employee claims (such as discrimination and wrongful discharge) *and* examples of typical employer claims (violations of confidentiality and breach of trade secrets). Most importantly, Lush expressly avowed

that, in exchange for Sako's agreement, it "likewise agree[d] to the use of mediation and arbitration as the exclusive forum for resolving employment disputes covered by this [a]greement." Read as a whole, the agreement covers claims by and against Lush.

Sako has misinterpreted the agreement in at least two more ways. First, it does not require her to submit to Lush's internal dispute resolution before mediation or arbitration. The agreement merely "encourage[s]" *both* parties to make good faith efforts at resolving any dispute through management channels. There is no mandated or unilateral "free peek" for Lush. Second, the agreement does not shorten the statute of limitations. It provides that both parties waive their claims unless they make a written request for mediation or arbitration within the relevant statute of limitations. Thus, the agreement merely incorporates the limitations period.

Sako does not identify what "additional steps" she thinks the agreement imposes, but she refers to section 1.f of the agreement. Section 1.f requires the parties to give each other written notice of their claims as soon as they know or should have known of the claims. The same section also requires the written request for mediation or arbitration within the limitations period. Courts have found substantive unconscionability where the employer has created onerous requirements only for the typical employee claims. (*Serafin*, *supra*, 235 Cal.App.4th at p. 181.) Even if the section 1.f requirements were onerous—and we are not convinced they are—the requirements apply equally to both parties and so are not unduly one-sided.

Finally, the mediation requirement is not substantively unconscionable. Sako does not explain why requiring mediation before arbitration unreasonably favors Lush. If her

concern is the mediation costs, the agreement provides that the parties shall share these costs, except in jurisdictions legally requiring the employer to bear these costs. Although an arbitration agreement generally cannot impose unreasonable costs or fees on the employee (*Serafin, supra*, 235 Cal.App.4th at p. 178), Sako has cited no authority to show her share of mediation costs would be unreasonable.

In sum, the substantive unconscionability shown here is nonexistent, and the procedural unconscionability is minimal. Accordingly, under the sliding scale approach, we must reject this defense.

IV. *Enforceability by Weathersby*

Sako's last defense relates to Weathersby. She argues that Weathersby, as a nonparty to the agreement, has no contractual right to arbitration. She further argues that because the causes of action against Weathersby must remain in court, the court should exercise its discretion to deny arbitration as to the whole complaint. (Code Civ. Proc., § 1281.2, subd. (c).) We agree that Weathersby has no right to enforce the arbitration agreement. On remand, the court should decide how to deal with the nonarbitrable claims against Weathersby and the arbitrable claims against Lush.

"'The right to arbitration depends on a contract.'" (*County of Contra Costa v. Kaiser Foundation Health Plan, Inc.* (1996) 47 Cal.App.4th 237, 245.) "[T]he strong public policy in favor of arbitration does not extend to those who are not parties to an arbitration agreement or who have not authorized anyone to act for them in executing such an agreement." (*Ibid*.) "However, both California and federal courts have recognized limited exceptions to this rule, allowing nonsignatories to an agreement

containing an arbitration clause to compel arbitration of, or be compelled to arbitrate, a dispute arising within the scope of that agreement." (*DMS Services, LLC v. Superior Court* (2012) 205 Cal.App.4th 1346, 1353.) Among these exceptions are the agency theory and the equitable estoppel theory. (*Suh v. Superior Court* (2010) 181 Cal.App.4th 1504, 1513.)

Under the equitable estoppel theory, """a nonsignatory defendant may invoke an arbitration clause to compel a signatory plaintiff to arbitrate its claims when the causes of action against the nonsignatory are 'intimately founded in and intertwined' with the underlying contract obligations. [Citations.] The reason for this equitable rule is plain: One should not be permitted to rely on an agreement containing an arbitration clause for its claims, while at the same time repudiating the arbitration provision contained in the same contract."""" (*DMS Services, LLC v. Superior Court*, *supra*, 205 Cal.App.4th at p. 1354.) The rule "'prevent[s] parties from trifling with their contractual obligations.'" (*Molecular Analytical Systems v. Ciphergen Biosystems, Inc.* (2010) 186 Cal.App.4th 696, 706.)

Under the agency theory, "when a plaintiff alleges a defendant acted as an agent of a party to an arbitration agreement, the defendant may enforce the agreement even though the defendant is not a party thereto." (*Thomas v. Westlake* (2012) 204 Cal.App.4th 605, 614.) The rationale is that "it would be unfair to defendants to allow [plaintiffs] to invoke agency principles when it is to [their] advantage to do so, but to disavow those same principles when it is not." (*Id.* at p. 615.)

Defendants rely on both of these theories. They contend that the arbitration agreement is part of the underlying employment agreement between Lush and Sako, and the causes of action against Weathersby are intimately founded in and intertwined with the employment agreement. They also point out that the complaint alleges that Weathersby acted as the agent of Lush.[4]

Even if the complaint contains agency allegations or is intimately founded in the employment agreement, there is no justification for resorting to the equitable estoppel and agency exceptions. The general rule controls: The right to arbitration depends on the contract. The language of the contract governs what claims the parties agreed to arbitrate. Here, the agreement expressly addresses which third party claims it covers. Lush and Sako broadly agreed to arbitrate "any controversy or claim arising out of or relating to [Sako's] employment relationship," but they also defined covered claims as "[a]ll those claims whether made against [Lush], any of its subsidiary or affiliated entities *or its individual officers or directors*." (Italics added.) Weathersby was a store manager, not an officer or director. The parties could have extended coverage to claims against agents and employees besides officers and directors. They did not. Sako is not therefore attempting to repudiate this particular aspect of the agreement or trifle with her

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[4] The complaint states: "Plaintiff is informed and believes, and thereon alleges, that each and all of the acts and omissions alleged herein were performed by, and/or are attributable to, all Defendants, each acting as agents and/or employees, and/or under the direction and control of each of the other Defendants, and that said acts and failures to act were within the course and scope of said agency, employment and/or direction and control. Plaintiff is informed and believes, and thereon alleges, that at all times material hereto Defendants were and are the agents of each other."

contractual obligations. Rather, she is seeking to enforce the agreement as written. Weathersby is not a party to the agreement, and the agreement does not cover claims against her because she is not an officer or director.

Because the causes of action against Weathersby are not arbitrable, we must remand for the trial court to decide the next steps. A trial court may refuse to compel arbitration if "[a] party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact." (Code Civ. Proc., § 1281.2, subd. (c).) This provision governs cases in which an arbitrable controversy affects claims against other parties who are not entitled to enforce the arbitration agreement. (*Cronus Investments, Inc. v. Concierge Services* (2005) 35 Cal.4th 376, 393; *Daniels v. Sunrise Senior Living, Inc.* (2013) 212 Cal.App.4th 674, 679-680.) Instead of refusing to compel arbitration, the court may stay the arbitration while the concurrent court action proceeds or stay the court action while the arbitration proceeds. (Code Civ. Proc., § 1281.2; *Cronus Investments, Inc. v. Concierge Services*, *supra*, at p. 393.) In either case, we review the court's decision for abuse of discretion. (*Daniels v. Sunrise Senior Living, Inc.*, *supra*, at pp. 680, 686.) On remand, the trial court should exercise its discretion on this issue.

For the foregoing reasons, Weathersby may not enforce the arbitration agreement. The court should decide whether to retain jurisdiction of the entire action, stay the arbitration on the arbitrable claims and let the court action proceed, or stay the court action on the nonarbitrable claims and let the arbitration proceed.

V. *Severance of Declaratory Relief Cause of Action*

This action involves one other type of nonarbitrable claim. The arbitration agreement expressly excludes claims by either party for injunctive or other equitable relief. Declaratory relief is a type of equitable relief. (*City of Hollister v. Monterey Ins. Co.* (2008) 165 Cal.App.4th 455, 480.) Consequently, Sako's cause of action for declaratory relief is not arbitrable.

On remand, if the court decides to let the causes of action against Lush proceed to arbitration, the order compelling arbitration must exclude the declaratory relief cause of action. The court should stay this cause of action pending any arbitration on the other causes of action against Lush. (*Coast Plaza Doctors Hospital v. Blue Cross of California* (2000) 83 Cal.App.4th 677, 693 [ordering all claims to arbitration except a claim for injunctive relief and staying the trial court proceedings].) "Without a stay, there is a threat of inconsistent judgments." (*Ibid.*) That is, the arbitrator might rule one way on the substantive causes of action against Lush, while the trial court might rule the other way on Sako's entitlement to declaratory relief for those substantive causes of action. With a stay, the outcome of the arbitration will determine whether Sako is entitled to the declaration that Lush violated her rights and unlawfully terminated her. (See *id.* [award on arbitrable claims, when reduced to final judgment, would determine the plaintiff's right to injunctive relief from the court on nonarbitrable claim].)

DISPOSITION

The order denying the petition to compel arbitration is reversed. The causes of action against Lush are arbitrable, except the declaratory relief cause of action. The

causes of action against Weathersby are not arbitrable. On remand, the trial court is directed to exercise its discretion under Code of Civil Procedure section 1281.2 to either (1) deny arbitration and retain jurisdiction of the entire action, (2) order the arbitrable causes of action against Lush to arbitration and stay the court proceeding pending the outcome of arbitration, or (3) order the arbitrable causes of action against Lush to arbitration but stay arbitration pending the outcome of the court proceeding against Weathersby. The parties shall bear their own costs of appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MENETREZ
J.

We concur:

MILLER
Acting, P. J.

FIELDS
J.